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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HOOPA VALLEY TRIBE,)	Civ. No. 1:20-cv-1814-JLT-EPG
)	
Plaintiff,)	
	)	PLAINTIFF HOOPA VALLEY
v.	)	TRIBE'S NOTICE AND AMENDED
	)	MOTION FOR PRELIMINARY
UNITED STATES BUREAU OF	)	INJUNCTION OR, IN THE
RECLAMATION; DEBRA ANNE HAALAND,	)	ALTERNATIVE, MOTION FOR
in her official capacity as Secretary of the	)	TEMPORARY RESTRAINING
Interior; MARIA CAMILLE CALIMLIM	)	ORDER
TOUTON, in her official capacity as)	
Commissioner of the United States Bureau of	)	Hearing Date: February 13, 2023
Reclamation; ERNEST A. CONANT, in his	)	Hearing Time: 9:00 AM
official capacity as United States Bureau of)	
Reclamation California-Great Basin Regional	)	Courtroom: 4 – 7 th Floor, Fresno
Director; and UNITED STATES	)	Judge: Hon Jennifer L. Thurston
DEPARTMENT OF THE INTERIOR)	
)	
Defendants.)	

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD

2 PLEASE TAKE NOTICE that, on February 13, 2023, at 9:00 AM, or as soon as the
3 matter may be heard, in Courtroom 4 of the above-entitled Court, located at 2500 Tulare Street,
4 Fresno, California, the Plaintiff Hoopa Valley Tribe (“Plaintiff” or “Hoopa”), pursuant to Rule
5 65 of the Federal Rules of Civil Procedure, Local Rule 231, and all other applicable rules, will
6 and hereby does apply and move for a preliminary injunction or, in the alternative, temporary
7 restraining order, enjoining the Defendants from implementing the Trinity River Winter Flow
8 Variability Project (WFV Project) in the absence of the concurrence of the Hoopa Valley Tribe
9 and until Defendants comply with NEPA. Hoopa’s concurrence is mandated by Section
10 3406(b)(23) of the Central Valley Project Improvement Act (CVPIA), Public Law 102-575
11 (1992).

12 On October 31, 2022, Plaintiff filed its First Amended and Supplemental Complaint,
13 which contains a Ninth Claim for Relief alleging violation of Hoopa’s concurrence rights
14 pursuant to CVPIA § 3406(b)(23). Dkt. #97. On December 16, 2022, Plaintiff filed a Motion
15 for Preliminary Injunction to enjoin approval and/or implementation of the WFV Project in
16 absence of Hoopa’s concurrence, to prevent irreparable harm to the Trinity River, its fishery, and
17 to Hoopa. (ECF Dkt. #108). On January 11, 2023, this Court correctly noted that Defendants
18 had not made a final decision regarding the WFV Project as of that date and requested
19 supplemental briefing on the issue of whether Plaintiff’s claims relating to the WFV Project and
20 Defendants’ failure to seek Hoopa concurrence challenged final agency action under the APA or
21 were otherwise ripe. ECF Dkt. #124. Plaintiff and Defendants each responded to that order on
22 January 25, 2023. ECF Dkt. ## 128, 129. Plaintiff argued that, although no final decision had
23 been made on the WFV Project, Defendants had unlawfully failed to act – by failing to seek or
24 obtain Hoopa concurrence as required by statute – and that failure constituted final agency action
25 reviewable under the APA. Dkt. #128.
26

1 On January 30, 2023, Defendants took final action to approve the WFV Project, with a
2 scheduled implementation commencement date of February 14, 2023. Plaintiff has filed a
3 Second Amended Complaint containing new allegations challenging the Defendants' approval of
4 the WFV Project on grounds that Defendants failed to seek or obtain Hoopa concurrence as
5 required by CVPIA Section 3406(b)(23) and that Defendants failed to comply with NEPA. Dkt.
6 #142.

7 This Court, on February 1, 2023, issued a Minute Order noting that the Court intended to
8 rule on Plaintiff's pending motion for preliminary injunction as expeditiously as possible.

9 Now, following the filing of its Second Amended Complaint (Dkt. #142), Plaintiff is re-
10 filing and amending its preliminary injunction motion (and in the alternative, given the imminent
11 implementation date, seeking a temporary restraining order).¹

12 Plaintiff is expressly relying on and incorporating by reference herein all its prior briefing
13 and declarations that are on file in support of the December 16, 2022 motion for preliminary
14 injunction, which specifically include the following:

15 ECF Dkt. #108 (Motion for Preliminary Injunction)

16 ECF Dkt. #108-1 (Memorandum in Support of Preliminary Injunction)

17 ECF Dkt. #109; 109-1 (Declaration of Mike Orcutt and Exhibit)

18 ECF Dkt. #110; 110-1 through 110-5; (Declaration of Joe Davis and Exhibits)

19 ECF Dkt. #111; 111-1 through 111-7) (Declaration of Thane Somerville and Exhibits)

20 ECF Dkt. #120 (Plaintiff's Reply in Support of Preliminary Injunction)

21 ECF Dkt. #120-1 (Second Declaration of Mike Orcutt)

22 ECF Dkt. #128 (Supplemental Brief)

24 ¹ Defendants' January 30, 2023 approval letter states the WFV Project will "be implemented no
25 sooner than February 14, 2023." Second Amended Complaint, Dkt. #142, Exh. 36. Given the
26 anticipated implementation date of Tuesday, February 14, 2023, Plaintiff hopes to obtain a ruling
from this Court on either its amended request for preliminary injunction or its alternative request
for a TRO on or before Monday, February 13, 2023.

1 In addition, Plaintiff is amending its preliminary injunction filing to address the new
2 allegations in Plaintiff's Second Amended Complaint relating to NEPA. Plaintiff is likely to
3 prevail on the merits of its NEPA claim, providing additional basis to enjoin the WFV Project.

4 This Amended Motion for Preliminary Injunction (and, in the alternative, TRO) is made
5 on the grounds that Plaintiff has demonstrated a strong likelihood of success on the merits of its
6 claim that the Defendants have violated the statutory delegation of sovereignty contained in
7 CVPIA § 3406(b)(23) by approving the WFV Project, which will result in significant and
8 unprecedented modifications of flows mandated by CVPIA § 3406(b)(23) and the 2000 Trinity
9 River Record of Decision (ROD), without the required concurrence of the Hoopa Valley Tribe.
10 Plaintiff's claim alleging "Violation of Hoopa's Delegated Sovereignty in CVPIA" is raised in
11 the Ninth Claim for Relief of Plaintiff's Second Amended and Supplemental Complaint for
12 Declaratory and Injunctive Relief, ECF #142, filed 02/07/23.

13 Defendants' approval of the WFV Project without Hoopa's concurrence, as required by
14 CVPIA section 3406(b)(23) is "arbitrary, capricious, an abuse of discretion, or otherwise not in
15 accordance with law," "in excess of statutory jurisdiction, authority, or limitations," and/or
16 "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). It also
17 constitutes an unlawful failure to act under the APA. 5 U.S.C. §§ 702, 706(1), 551(13). Plaintiff
18 is also likely to prevail on the merits of its claim that Defendants failed to comply with NEPA
19 with regard to the WFV Project (Second Claim for Relief, Second Amended Complaint, Dkt.
20 #142).

21 Hoopa will suffer irreparable harm unless Defendants are restrained from implementing
22 the Trinity River WFV Project because once such water is released, it will be unavailable for use
23 to implement the flows and flow regime that are mandated by CVPIA § 3406(b)(23) and the
24 ROD. Declarations of Michael Orcutt (ECF Dkt. #109, 120-1); Declaration of Joe Davis (ECF
25 Dkt. #110). Hoopa will also suffer irreparable harm to its sovereignty as reflected in CVPIA
26

1 section 3406(b)(23). The violation of NEPA also gives rise to an irreparable procedural injury.
2 The balance of hardships and the public interest strongly favors injunctive relief.

3 Plaintiff's counsel certifies that they have satisfied required meet and confer requirements
4 in advance of filing this motion. As previously described in ECF Dkt. #108 and #111, Plaintiff's
5 and Defendants' counsel and representatives conferred extensively prior to the filing of
6 Plaintiff's December 16, 2022 preliminary injunction motion without resolution. Since that date,
7 Defendants have filed briefs affirmatively arguing against Hoopa's right of concurrence and have
8 also approved the WFV Project without seeking or obtaining Hoopa concurrence. Plaintiff's
9 counsel also informed Defendants' counsel of its intent to file this Amended Motion and
10 alternative TRO request in advance of filing.

11 Hoopa submits this Amended Motion for Preliminary Injunction, or TRO, on the papers
12 described above. However, Hoopa requests an opportunity to present live testimony at a hearing
13 on this motion if the Court concludes that material facts are in dispute and that resolution of the
14 conflict will determine the outcome on the motion, or if relief would be denied based on the
15 written evidence and argument alone. Hoopa expects a hearing, if necessary, may take 2-3
16 hours.²

17 Because counsel for both Plaintiff and Defendants are located out-of-state, Plaintiff
18 proposes that any hearing on this motion be conducted virtually or telephonically if possible.

19 DATED this 7th day of February, 2023.

20 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

21 /s/ Thane D. Somerville

22 Thane D. Somerville WSBA #31468

23 Thomas P. Schlosser WSBA #06276

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²Hoopa acknowledges that the Court, in its February 1, 2023 Minute Order, stated that it does not intend to hold a hearing relating to Plaintiff's Motion for Preliminary Injunction. ECF Dkt. #133.

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Attorneys for Plaintiff Hoopa Valley Tribe

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Thane D. Somerville

Thane D. Somerville